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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

H024633

Plaintiff and Respondent,

(Santa Clara County
Superior Court
No. CC118496)

v.

EDWARD MICHAEL GRANADO,

Defendant and Appellant.

_____ /

Defendant Edward Michael Granado was charged by information with two counts of robbery (Pen. Code, § 211). The information also alleged that defendant had suffered three prior strike convictions (Pen. Code, § 1170.12) and one prior serious felony conviction (Pen. Code, § 667, subd. (a)), and that he had served one prison prior (Pen. Code, § 667.5, subd. (b)). Defendant waived a jury trial and opted for a court trial. The trial court found defendant guilty of both substantive counts and then found the prior allegations true. Defendant was sentenced to a term of 55 years to life in state prison. On appeal defendant contends the trial court “committed prejudicial error when it denied his constitutional right to represent himself at trial.”

I. Facts

On May 7, 2001 defendant entered the Bank of the West at 3233 Scott Boulevard in Santa Clara and gave a teller a note that said “This is a stick-up.” Defendant requested twenties and fifties. He fled, leaving the demand note, after the teller handed over \$6,747 in cash. The demand note was recovered and found to bear the fingerprint of defendant.

On July 31, 2001, defendant robbed the same bank branch. Wearing a baseball cap, large sunglasses, and latex gloves, he approached a different teller and handed him a piece of paper towel with “This is a stickup” written on it. When the teller handed over money, defendant whispered, “more hundreds.” After the teller met the whispered request, defendant left with \$7,144, including some “bait” money.

A witness wrote down the license plate number of defendant’s getaway car. Through defendant’s parole agent, Santa Clara police officers arranged to be waiting at defendant’s residence as he drove up in the getaway car. On his person and in his car defendant had a large amount of cash, including the “bait” bills.

After he was admonished pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, defendant admitted he had committed the July robbery. He denied the May robbery but was identified as the robber by his fingerprints.

II. Discussion

Defendant contends the trial court erred in denying his request to represent himself.

Defendant’s request to represent himself was made immediately after the trial court indicated its tentative decision to deny defendant’s *Marsden* (*People v. Marsden* (1970) 2 Cal.3d 118) motion for substitute counsel. The following colloquy ensued: “The Court: Well, then as far as the [*Marsden*] motion is concerned, then I must deny it. I find no proper grounds for granting a *Marsden* Motion at this point. [¶] The Defendant:

Sir, *if you're not going to dismiss this counsel, I have to change my status to pro per.* I don't – [¶] The Court: You want to go pro per? I think you'll find yourself on the side of disadvantage if you did. I'll ask you again: Do you want to do that? You are facing very serious charges here. [¶] The Defendant: *And the person that's not going to go over my case with me is not going to do any kind of aiding to me.* [¶] The Court: *Unless you tell me definitely that you want to go pro per, I will simply deny the Marsden Motion and go ahead with the trial.* [¶] It's rather late to bring a pro per motion now too because we're about to start the trial. We're bringing a jury in tomorrow and we're taking in limine motions this afternoon. [¶] The prosecutor has appeared so I will deny the motions in this case as not being properly brought without sufficient foundation.” (Italics added.)

A criminal defendant has a constitutional right of self-representation. (U.S. Const., 6th Amend.; *Faretta v. California* (1975) 422 U.S. 806, 818-836 (*Faretta*); *People v. Bradford* (1997) 15 Cal.4th 1229, 1365.) However, this right is not self-executing. (*People v. Marshall* (1997) 15 Cal.4th 1, 20.) To invoke the unconditional right of self-representation, a defendant “‘must make an unequivocal assertion of that right within a reasonable time prior to the commencement of trial. [Citations.] When a motion for self-representation is not made in a timely fashion prior to trial, self-representation no longer is a matter of right but is subject to the trial court’s discretion.’ [Citation.]” (*People v. Jenkins* (2000) 22 Cal.4th 900, 959.)

The People argue that the court properly denied defendant’s request because his request was neither unequivocal nor timely. We agree that the request was equivocal.

In *People v. Marshall, supra*, 15 Cal.4th 1, the California Supreme Court discussed the requirement that a request be unequivocal. It noted that the United States Supreme Court’s emphasis that a request be knowing, voluntary, unequivocal, and competent, “suggests that an insincere request or one made under the cloud of emotion may be denied.” (*Id.* at p. 21.) In reviewing decisions by lower courts, the

Marshall court noted that some “have declared that a motion made out of a temporary whim, or out of annoyance or frustration, is not unequivocal—even if the defendant has said he or she seeks self-representation. [Citations.] . . . As one court expressed it, a court ‘properly may deny a request for self-representation that is a “momentary caprice or the result of thinking out loud.” ’ [Citation.]” (*Ibid.*)

For example, the court cited one case, where the trial court responded to the defendant’s request by asking whether he was certain he wanted to represent himself. The defendant said he was. “The reviewing court nonetheless found the record as a whole did not reflect an unequivocal request, but rather a spur of the moment decision prompted by the denial of defendant’s motion for substitute counsel. [Citation.]” (*People v. Marshall, supra*, 15 Cal.4th at p. 21.) In another case, “the defendant stated: ‘I want to fight it in pro per then. Relieve him and I do this myself.’ ” The reviewing court considered the record as a whole, including the defendant’s failure to assert the right of self-representation at a later hearing, and independently determined that the defendant’s request for self-representation was an impulsive response to the trial court’s denial of his request for substitute counsel. Examining the question whether the defendant in fact wanted to represent himself, the court stated: ‘[The defendant’s] emotional response when disappointed by the trial court’s denial of his motion for substitute counsel did not demonstrate to a reasonable certainty that he in fact wished to represent himself.’ [Citation.]” (*Id.* at p. 22.) Moreover, “[s]ome courts have held that vacillation between requests for counsel and for self-representation amounts to equivocation or to waiver or forfeiture of the right of self-representation. [Citations.] And another court has advised that the defendant’s conduct, as well as words, must be taken into account, stating: ‘Equivocation, which sometimes refers only to speech, is broader in the context of the Sixth Amendment, and takes into account conduct as well as other expressions of intent.’ [Citation.]” (*Ibid.*)

The *Marshall* court observed “[m]any courts have explained that a rule requiring the defendant’s request for self-representation to be unequivocal is necessary in order to protect the courts against clever defendants who attempt to build reversible error into the record by making an equivocal request for self-representation. Without a requirement that a request for self-representation be unequivocal, such a request could, whether granted or denied, provide a ground for reversal on appeal. This problem has irked many courts, and some of their opinions have given examples of such abuse. [Citations.]” (*People v. Marshall, supra*, 15 Cal.4th at p. 22.)

The *Marshall* court shared this concern that requests could become vehicles for manipulation and abuse. (*People v. Marshall, supra*, 15 Cal.4th at p. 22.) “It is not only the stability of judgments that is at stake, however, when we require a defendant to make an unequivocal request for self-representation. The defendant’s constitutional right to the effective assistance of counsel also is at stake—a right that secures the protection of many other constitutional rights as well. [Citations.] The high court has instructed that courts must draw every inference against supposing that the defendant wishes to waive the right to counsel. [Citation.] It follows, as several courts have concluded, that in order to protect the fundamental constitutional right to counsel, one of the trial court’s tasks when confronted with a motion for self-representation is to determine whether the defendant truly desires to represent himself or herself. [Citations.] . . . The court faced with a motion for self-representation should evaluate not only whether the defendant has stated the motion clearly, but also the defendant’s conduct and other words. Because the court should draw every reasonable inference against waiver of the right to counsel, the defendant’s conduct or words reflecting ambivalence about self-representation may support the court’s decision to deny the defendant’s motion. A motion for self-representation made in passing anger or frustration, an ambivalent motion, or one made for the purpose of delay or to frustrate the orderly administration of justice may be denied.” (*Id.* at pp. 22-23.)

The recent case of *People v. Scott* (2001) 91 Cal.App.4th 1197 is helpful in analyzing whether defendant's request was unequivocal. There, the defendant made a *Marsden* motion less than a week before trial. When it was denied, the defendant immediately sought to represent himself, indicating, however, that he would need a continuance. The court said it would not grant the request unless he was ready for trial as scheduled. The defendant pointed out that he had told the court several months before that he did not want his appointed counsel, his motion to substitute had been denied, and he then tried, but was able, to work with counsel. The defendant further noted that he could not stop the court from conducting the trial, but the remaining days were not enough for him to prepare. He opined that the appellate court would later settle the matter in his favor. The court reiterated that it would not grant a continuance. It then told the defendant that if he wanted to represent himself, he had to represent unequivocally that he could try this case. The defendant said he could not do so, and the court denied his request. (*Id.* at pp. 1204-1205.)

In affirming the denial of the request, the *Scott* court found that it was equivocal.¹ It noted that the request came immediately after the defendant's *Marsden* motion was denied. The court further pointed out that the defendant's subsequent comments indicated that he sought self-representation only because he wanted to get rid of his appointed attorney. In this regard, the court noted that, when the defendant was given a *Faretta* waiver form and the court asked if the defendant was sure he wanted to represent himself, defendant responded, "'Yes. I do, judge. I don't want [appointed defense counsel] to represent me,'" "'[i]f I can't get a [new] state appointed attorney, then I represent myself,' and, '[f]or the record, I don't want this attorney representing me. You the court is coercing me.'" (*People v. Scott, supra*, 91 Cal.App.4th at p. 1205.)

¹ The court also found the request untimely.

Here, defendant tried to obtain substitute counsel shortly before his trial was to begin. Immediately after his effort to obtain substitute counsel was stymied by the trial court's denial of his *Marsden* motion, defendant asked to represent himself. At that point, the trial court advised defendant that he would find himself disadvantaged if he represented himself and reminded him that he was facing very serious charges. When the trial court tried to determine whether defendant really wanted to represent himself, defendant did not repeat that he wanted to represent himself but, instead, reiterated his dissatisfaction with his current attorney. We agree with the trial court that defendant did not unequivocally seek self-representation. The record reflects that, after saying he would represent himself, defendant equivocated when asked whether he actually wanted to represent himself despite the seriousness of his case and the disadvantages inherent in self-representation. He shifted the discussion to his complaints about counsel's prior and anticipated performance.

When we consider the entire record, we conclude that defendant's request was not an unequivocal request based on a consistent, firm, and well-considered desire to represent himself. Rather, here, as in *Scott*, the record demonstrates that defendant "made the *Faretta* motion out of frustration at having his Marsden motion denied, rather than from a genuine desire to represent himself." (*People v. Scott, supra*, 91 Cal.App.4th at p. 1206.) Under the circumstances, we conclude the trial court did not err by denying defendant's equivocal *Faretta* request.

III. Disposition

The judgment is affirmed.

Mihara, J.

WE CONCUR:

Elia, Acting P.J.

Wunderlich, J.